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NEWSPAPER PRESERVATION ACT

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Mr. THURMOND, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 2314]

The Committee on the Judiciary, to which was referred the bill (S. 2314) to amend the Newspaper Preservation Act, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

CONTENTS

	Page
I. Purpose	1
II. Text of S. 2314 as Reported	4
III. Need for Legislation	4
IV. Committee Action	8
V. Section-by-section Analysis of Reported Bill	9
VI. Executive Communication	10
VII. Regulatory Impact Statement	15
VIII. Estimated Cost of Legislation	15
IX. Changes in the Existing Law	16
Additional Views of Senator DeConcini and Senator Metzenbaum	20

I. PURPOSE

The Newspaper Preservation Act was enacted in 1970. Its purpose and intent were to preserve separate news and editorial voices in those cities which could not otherwise provide more than one newspaper with a sound financial base. In the Newspaper Preservation Act, Congress sought to preserve and encourage joint operating arrangements in which two previously competing newspapers join their commercial functions while retaining two separate and distinct news voices.

Joint newspaper operating agreements began in Albuquerque, New Mexico, in 1933, where two publishers recognized that there

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was only enough advertising to support one successful commercial operation. In order to maintain two separate and distinct editorial and news voices of the two newspapers, they agreed to merge the business operations of the two newspapers, forming one sales force and one business office to buy supplies and provide for the circulation of both newspapers. There were still two mechanical staffs, because production of morning and evening newspapers required two production staffs, but only one plant. Through the savings accomplished by this commercial joint venture, both newspapers were able to continue their news and editorial rivalry.

In 1970, the Congress was aware of the steady decline in the number of American cities in which there were two or more newspapers in both commercial and editorial competition. In many cases, when one competing newspaper became financially distressed, that weaker paper simply ceased to publish. Joint operating arrangements provided a means of preserving a financially ailing newspaper and retaining its separate editorial voice in the community. By 1970, there were only 45 cities with commercially competing newspapers, plus 22 cities with joint newspaper operating agreements.

In 1969, the Supreme Court ruled that joint operating agreements between competing newspapers violated the antitrust laws. *Citizen Publishing Co.* v. *United States,* 394 U.S. 131 (1969). In response to that ruling and in order to preserve joint newspaper operating arrangements, the Congress enacted the Newspaper Preservation Act which confers antitrust immunity on certain activities of joint operating arrangements that have obtained prior approval from the Attorney General. The Act contained the following statement of purpose:

> In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provision of this chapter. 15 U.S.C. Section 1801.

This bill recognizes that the Act has served the public interest well, and does not propose radical changes in the Newspaper Preservation Act. Rather, S. 2314 is in the nature of an amendment to clarify certain provisions in order to make explicit Congressional intent.

In the 16 years since the passage of the Act in 1970, vast technological and consumer marketing changes have reshaped the newspaper publishing business. Dissemination of the kind of information traditionally associated with newspapers is no longer confined solely to the newsprint formats, and electronic transmission of newspapers to individual readers is now practical. New marketing strategies have evolved in response to changing demographics and consumer interest.

When Congress enacted the Newspaper Preservation Act in 1970, it could not reasonably have foreseen the substantial pressures

that such technological advances would exert on the newspaper publishing business. Nevertheless, the basic Congressional purpose was and continues to be the preservation of competitive reportial and editorial voices by authorizing competing newspapers to engage in joint commercial activities associated with publishing their individual newspapers. It is the intention of the Committee to clarify, by way of amendment, that the Newspaper Preservation Act is sufficiently flexible to accommodate changing formats and technology in the newspaper publication business.

Unfortunately, the present language of the statute has not, in certain instances, proved sufficiently unambiguous to accommodate technological and marketing developments in the publishing business that have emerged in the years since 1970. Because of a perceived ambiguity in statutory construction, joint operating arrangements can not employ the rapidly evolving techniques and strategies of today's newspaper publishing business to stay competitive without the risk of antitrust suits.

In some markets, ambiguity about the legal status of some activities of joint operating companies and the threat of antitrust lawsuits have discouraged the use of innovative techniques such as "total market coverage" by joint operating agencies. Rather than expose themselves to such risks, joint operating agencies refrain from use of the new tools of the newspaper business and forego business opportunities that are important to the financial viability of the participating newspapers. The penalty for foregoing these business opportunities is the loss of competitive status, resulting in a downward spiral in circulation and advertising and a threat to the independence of their editorial voices.

The purpose of this bill is two-fold: 1) to clarify that jointly operating newspapers under the Newspaper Preservation Act may engage in activities which are part and parcel of newspaper publishing, including "total market coverage" business under the coverage of the Act and 2) to clarify that the Act itself does not make *per se* unlawful any conduct engaged in by the participants in a joint operation agreement. S. 2314 will clarify the coverage of the Newspaper Preservation Act's antitrust exemption and remove any cloud on the operations of joint operating agencies that would place them at a competitive disadvantage *vis-a-vis* newspapers that are not parties to joint operating agreements.

By letter dated July 22, 1986, to the Chairman of the Committee, the Department of Justice provided the following clarification, with which we concur:

> The Newspaper Preservation Act is solely an antitrust-exemption statute. It does not itself create any legal prohibitions, but merely exempts certain conduct from scrutiny under the antitrust laws when the prior approval of the Attorney General has been obtained. *Newspaper Guild* v. *Levi,* 539 F.2d 755 (D.C. Cir. 1976), *cert. denied,* 429 U.S. 1092 (1977). Accordingly, joint activities by JOA participants that do not fit within the confines of the Act's JOA exemption are neither provided an antitrust exemption by the Act nor made illegal by the Act. (Letter to Senator

Strom Thurmond from John R. Bolton, Assistant Attorney General, Department of Justice, dated July 22, 1986.)

II. Text of S. 2314 As Reported

[S. 2314, 99th Cong. 2d Sess.]

A BILL To amend the Newspaper Preservation Act

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) section 3(2) of the Newspaper Preservation Act (Public Law 91-353; 15 U.S.C. 1802(2)) is amended by inserting after "distribution" the first time it appears the following: "of all or part of such newspaper publications".

(b) Section 4(b) of such Act (15 U.S.C. 1803(b)) is amended by striking out the first sentence and inserting in lieu thereof the following: "It shall not be unlawful for any person to enter into, perform, or enforce a joint operating arrangement not already in effect, if the prior written consent of the Attorney General has been obtained.".

(c) Section 4 of such Act (15 U.S.C. 1803) is amended by adding at the end thereof the following new subsection:

"(d) In any action under any antitrust law challenging joint conduct between the parties to a joint newspaper operating arrangement that has received the limited antitrust exemption provided by subsection (a) or (b) of this section, joint conduct between the parties that is not exempt as part of such arrangement but that is reasonably ancillary to the business of publishing the newspaper publications involved in the arrangement shall not be deemed illegal per se. Such joint conduct shall be judged on the basis of its reasonableness, taking into account all relevant factors affecting competition in properly defined relevant markets.".

III. Need for Legislation

It is unnecessary to recite here the factors that have enabled financially distressed newspapers to survive through the merger of their commercial operations with those of healthier competitors. That background is amply set forth in the legislative history of the Newspaper Preservation Act.[1]

Of more relevance is the experience of joint operating agencies in the sixteen years since enactment of the Newspaper Preservation Act.

It appears that the goal of ensuring the well-being of the joint operating arrangements ("JOA"s) in existence in 1970 has been quite well achieved. There were twenty-one joint operating agencies in operation in 1970, of which eighteen are still functioning.[2] Moreover, three new joint operating agencies—in Cincinnati, Ohio, Chattanooga, Tennessee and Seattle, Washington—have been au-

[1] *See:* Senate Report No. 91-535; House Rep. No. 91-1193; Hearing before the Subcommittee on Antitrust and Monopoly, Senate Committee on the Judiciary, 90th Congress, on S. 1312; Hearings before the Subcommittee on Antitrust and Monopolies, Senate Committee on the Judiciary, 91st Congress, on S. 1520; Hearings before the Monopolies Subcommittee, House Committee on the Judiciary, 91st Congress, on H.R. 279.

[2] For a list of cities with joint operating agreements from the year 1970, *see* Appendix A.

thorized by the Department of Justice.[3] This means that the newspaper preservation mechanism has preserved many news voices that might have otherwise been stilled. During the same 16-year period, many other major papers have in fact failed and their news voices have not been replaced.

Between 1970 and 1985, circulation of weekly newspapers in the United States increased from 27,857,332 to 48,988,801—a 75.8 percent gain. During the same period, one-owner two-newspaper combinations dropped from 99.75% household penetration in their primary market areas to 60.75% and JOA's dropped from 77.54% to 58.04%.[4] Much of this change is the result of successful competition from suburban and weekly newspapers. The empiric evidence presented to the Committee demonstrates that JOA's have not adversely affected suburban and weekly newspapers, which thrive in areas where JOA's exist.

Nevertheless, the ability of the joint operating arrangements to continue in operation may be compromised by an apparent lack of clarity in the Act itself with respect to the scope of business activities in which joint operating agencies may engage. During the hearings on this bill, three areas of business activity were discussed: "total marketing coverage," publication on "slick" paper, and so-called "electronic delivery" of newspapers.

Because of changing demographics, consumer interests and advertisers' demand, "total market coverage" ("TMC") has become a potent tool in the competition for critical advertising revenue. TMC involves the guarantee to an advertiser that its advertisements will be delivered to every home or apartment in a postal zone or an entire city. Daily metropolitan and suburban newspapers, as well as weekly newspapers throughout the United States, engage in TMC marketing; [5] in addition, there are national and local direct mailing firms. Yet, in a recent court decision, the validity of TMC activity by a joint operating company has been questioned.

In *Wick* v. *Tucson Newspapers, Inc.*, 598 F. Supp. 1155 (D Aug. 1984), a suburban newspaper sued the joint newspaper operating company in Tucson to enjoin it from distribution of advertising material in the circulation area served by the plaintiff. The *Wick* Court condemned as *per se* illegal the joint publication activities of the JOA participants having to do with TMC.

The court in *Wick* apparently used the *per se* standard of legality because it regarded joint conduct such as that at issue in *Citizen Publishing Co.* v. *United States* as being *per se* illegal after that Supreme Court ruling; regarded the Act as an antitrust exemption for

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[3] In addition, a joint agency was authorized in Anchorage, Alaska, but was terminated.

[4] For example, in 1953, the first year after the *Salt Lake Tribune* and the *Deseret News* entered into a JOA, their combined circulation was 180,929, and their penetration of the primary market area (PMA) was 97.9%. By 1970, their combined circulation was 191,572 and their penetration of PMA was 93.11%. In 1985, total circulation had dropped to 173,781 and PMA penetration was 51.98%. This was during a period when population and number of households in Salt Lake City and its PMA increased substantially.

[5] The Department of Justice recognizes that TMC is "part and parcel" of newspaper publishing. The publisher of a new suburban Baltimore paper, the *Owings Mills Times*, predicates its anticipated success primarily on its free distribution to *all* private homes in a specified sector of Baltimore County. *See: The Daily Record*, March 27, 1986, p.1, cols, 1-2. In Little Rock, Arkansas, a federal jury recently found that *The Arkansas Democrat* had not violated antitrust laws by engaging in various activities including the free distribution of the Wednesday edition over a five-year period to 70,000 non-subscribers. *New York Times, March 27, 1986.*

some joint conduct under certain conditions; and viewed all other joint conduct that has not been exempted as *per se* illegal. The court also noted that the Tucson joint operating arrangement in the *Wick* case was the same joint operating arrangement that was involved in the *Citizen Publishing* case. The *Wick* court held that joint distribution of slick paper advertising inserts without an accompanying substantial news and editorial product could not be covered by approval of a joint operating agreement under the Newspaper Preservation Act.

The Department of Justice has clarified that the Newspaper Preservation Act itself does not make unlawful any joint newspaper-related activity. The Newspaper Preservation Act does not create any legal prohibitions; it merely exempts certain conduct from the application of antitrust law when the prior approval of the Attorney General has been obtained.

A literal reading of the Newspaper Preservation Act, 15 U.S.C. Section 1803(b), would suggest that joint conduct is illegal where the joint operating agreement has neither been grandfathered under 15 U.S.C. Section 1803(a) nor received the Attorney General's prior approval. However, the U.S. Court of Appeals rejected such a literal reading of the Act as being inconsistent with Congressional policy underlaying the Act. *Newspaper Guild* v. *Levi*, 539 F.2d 755 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977). Thus, joint activities by joint operating agreement participants that do fit within the confines of the Act's exemption are neither exempted from antiturst law by the Act nor made illegal by the Act. Of course, those joint activities that do fit within the Act's exemption are immune from antitrust law.

This bill clarifies that joint TMC activities by the participants to a joint operating agreement are within the Newspaper Preservation Act's exemption and thereby treats such activities the same as other non-editorial aspects of the newspaper business. Decisions on how to distribute all or part of newspapers, particularly decisions on whether and how to engage in total market coverage, should be viewed as part and parcel of the business of newspaper publishing and, therefore, be covered by the Act's exemption. While this bill would make it clear that joint TMC distribution of all or part of joint operating agency newspaper is within the Act's exemption, that conduct still would remain subject to challenge as a predatory practice.

The Committee believes that there is sufficient justification for reading into the Newspaper Preservation Act authority for joint operating agencies to engage in TMC activities. Because Congress intended to assist financially weak newspapers and to put participants in a joint operating agreement in the same position as single newspapers in all but editorial and reportorial respects, it would not serve the purpose of the Act to construe it in a way that precluded jointly operated newspapers from using TMC advertisement marketing techniques, which are part and parcel of newspaper publishing. Of course, even though joint TMC activities are included in the coverage of the Newspaper Preservation Act, the prohibition against any predatory or otherwise unlawful conduct in the Act, 15 U.S.C. Section 1803(c), remains in force.

The court in the *Wick* case placed much emphasis on the use of the word "newsprint" in the Newspaper Preservation Act, 15 U.S.C. Section 1802(4). The Committee wishes to clarify that the term "newsprint" should not be interpreted as limiting a joint operating agency publication to exclusive use of the type of paper that had been traditionally employed in newspaper production. Newspapers, both single and jointly operated, now make extensive use of slick paper and high resolution paper for various parts of the newspaper, including special sections and advertising supplements. This bill will clear up any ambiguity as to whether joint operating agencies may lawfully engage in TMC activities, such as shoppers, without newsprint or news or editorial content in the TMC product. There is no requirement that the TMC product itself be printed on newsprint, or contain news and editorial content—things which need be included only in the whole of the newspaper publication of which it is a part.

The Committee did not find it necessary to remove the word "newsprint" from the definition of "newspaper publication." [6] In recent years, a lower percentage of the total content of a newspaper has been printed on traditional newsprint paper; more and more is being printed on better-resolution newsprint paper. With new technologies, the trend toward use of high resolution paper is likely to continue. By leaving the term "newsprint" in the Newspaper Preservation Act, the Committee does not intend to require that all of a publication, including A TMC product, be on the particular stock traditionally known as newsprint paper. TMC that is part of a "newspaper publication" is part and parcel of newspaper publishing by joint operating agencies or others, and such joint publication activity is covered by the Newspaper Preservation Act's exemption, subject to Section 4(c) of the Act.

It is the understanding and intention of the Committee that the joint operating agency's TMC product may be printed on paper other than newsprint and that it may contain only advertising material. Those TMC products may be jointly produced and distributed under the coverage of the Newspaper Preservation Act so long as those TMC activities are part and parcel of the joint operating agreement participants' business of publishing a newspaper.

In addition to clarifying that joint TMC activities are within the exemption provided by the Newspaper Preservation Act, the bill makes a change in the Act to clarify the form of antitrust analysis that is to be applied to those activities of a joint operating agency that are not within the coverage of the Act's exemption. As explained earlier, the Newspaper Preservation Act does not itself create any legal prohibitions. Accordingly, joint activities by participants in a joint operating agreement that do not fit within the Act's exemption are neither exempted from antitrust law nor made illegal by the Act itself. The bill amends 15 U.S.C. Section 1803(b) to clarify this point. Joint activities are subject to the antitrust laws, and such joint activity generally would be analyzed as a joint venture under a rule of reason and not condemned as *per se* illegal. The bill amends the Act to provide explicitly for rule-of-reason

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[6] The Department of Justice noted that removal of "newsprint" from the Act would enable magazine publishers to qualify for the Act's exemption.

analysis of joint activities that are ancillary to the business of publishing the JOA newspapers. Without this clarification, an application of the wrong legal standard could have an undesirable chilling effect on conduct that may involve competitive efficiencies.

The rule of reason, not the *per se* standard, is the correct antitrust standard for activities reasonably ancillary to the business of publishing joint-operation newspapers. The bill would clarify that activities by participants in a joint operating agreement, if reasonably ancillary to the business of publishing the newspaper publications involved in the joint operating agreement, will be subject to the rule of reason, if challenged under antitrust law. An example of joint conduct that would be given such antitrust treatment is electronic publication of a newspaper. Joint electronic publication of a newspaper, by JOA parties or non-JOA parties, would be judged on the basis of its reasonableness, taking into account all relevant factors affecting competition in properly defined relevant markets.

Since the passage of the Newspaper Preservation Act, there have been significant new developments and new technologies in newspaper publishing. It is important to the competitive effectiveness and viability of newspapers, including joint operating agreement newspapers, that they keep up with these market innovations. These changes have included the use of TMC, improvements in the quality of newspaper through high resolution and slick papers, and electronic delivery of newspapers. This bill clarifies the ability of joint operating agreement newspapers to participate in these and other future developments in technology and marketing. This bill amends the Newspaper Preservation Act in a way that anticipates the evolution of the marketplace of information-distribution, and it clarifies the standard for testing joint activities under antitrust law.

Activities not specified in the Act may be either part and parcel of newspaper publishing (and *per se* legal within the meaning of the Act) or reasonably ancillary to the business of publishing (and subject to analysis under the rule of reason). JOA activities which fall outside either of those categories are not made illegal *per se* by the Act. Such activities are to be judged by current antitrust principles.

The public interest in preserving joint operating newspapers, and expressly permitting them to compete as single newspapers, is a sound and necessary basis for the proposed amendments. The Committee believes that the situation facing JOA newspapers today demonstrates a clear need for this legislation. Accordingly, the Committee has reported S. 2314.

IV. Committee Action

The Committee conducted a day of hearings on S. 2314 on June 10, 1986. S. 2314 was reported as amended by the Committee by unanimous consent, subject to agreements to be reached between Senators Hatch, Metzenbaum and DeConcini before the bill is considered on the floor.

Prior to final passage, the Committee adopted the following amendments in the nature of a substitute offered by Senator Hatch:

Strike out all after the enacting clause and insert in lieu thereof the following:

That (a) section 3(2) of the Newspaper Preservation Act (Public Law 91-353; 15 U.S.C. 1802(2)) is amended by inserting after "distribution" the first time it appears the following: "of all or part of such newspaper publications".

(b) Section 4(b) of such Act (15 U.S.C. 1803(b)) is amended by striking out the first sentence and inserting in lieu thereof the following: "It shall not be unlawful for any person to enter into, perform, or enforce a joint operating arrangement not already in effect, if the prior written consent of the Attorney General has been obtained.".

(c) Section 4 of such Act (15 U.S.C. 1803) is amended by adding at the end thereof the following new subsection:

"(d) In any action under any antitrust law challenging joint conduct between the parties to a joint newspaper operating arrangement that has received the limited antitrust exemption provided by subsection (a) or (b) of this section, joint conduct between the parties that is not exempt as part of such arrangement but that is reasonably ancillary to the business of publishing the newspaper publications involved in the arrangement shall not be deemed illegal per se. Such joint conduct shall be judged on the basis of its reasonableness, taking into account all relevant factors affecting competition in properly defined relevant markets.".

V. Section-by-Section Analysis

Section (a) amends the Newspaper Preservation Act, 15 U.S.C. Section 1802(2), by inserting after "distribution" the first time it appears the words "of all or part of such newspaper publications". This amendment modifies one item in the list of activities that may be jointly undertaken by a joint newspaper operating arrangement. In the relevant section of the Act, the term "joint newspaper operating arrangement" means any contract, agreement, joint venture or other arrangement entered into by two or more newspaper publications, pursuant to which joint or common production facilities are established or operated and joint or unified action is taken or agreed to be taken with respect to any one or more of the following: (among other things) distribution of all or part of such newspaper publications. This section brings within the Act's exemption joint activities of joint operating arrangement participants in distributing all or part of the joint arrangement's newspapers through "total market coverage," and thereby treats such activities the same as other non-editorial and non-reportorial aspects of the newspaper business.

Section (b) amends the Newspaper Preservation Act, 15 U.S.C. Section 1803(b), by striking the first sentence of subsection 1803(b) and inserting the following: "It shall not be unlawful for any person to enter into, perform, or enforce a joint operating arrangement not already in effect, if the prior written consent of the Attor-

ney General has been obtained." This makes it clear that the Act itself does not create any new legal prohibitions. Joint newspaper-related activity that is outside the coverage of the exemption granted by the Act is not made unlawful by the Act itself.

Section (c) amends the Newspaper Preservation Act, 15 U.S.C. Section 1803, by adding a new subsection 1803(d) as follows: "In any action under any antitrust law challenging joint conduct between the parties to a joint newspaper operating arrangement that has received the limited antitrust exemption provided by subsection (a) or (b) of this section, joint conduct between the parties that is not exempt as part of such arrangement but that is reasonably ancillary to the business of publishing the newspaper publications involved in the arrangement shall not be deemed illegal *per se*. Such joint conduct shall be judged on the basis of its reasonableness, taking into account all relevant factors affecting competition in properly defined relevant markets." This section makes clear that the rule of reason is the correct form of antitrust analysis for electronic publication or other activities closely related to the business of publishing joint operating arrangement newspapers.

VI. Executive Communication

U.S. Department of Justice,
Office of Legislative and Intergovernmental Affairs,
Washington, DC, July 22, 1986.

Hon. Strom Thurmond,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: This letter is in response to your request for the views of the Department of Justice on S. 2314, a bill to amend the Newspaper Preservation Act. This bill is apparently intended primarily to expand the antitrust exemption provided to newspaper joint operating arrangements (JOAs) by that Act so as to protect so-called "total market coverage" distribution of part of newspaper publications, as well as electronic publication activities. The Department recommends against enactment of this bill as introduced; however, the Department would not oppose legislation that (1) adjusted the definition of the activities that may be conducted by an exempt JOA to include the distribution of part of a newspaper publication, (2) made clear that conduct that is not exempt as part of a JOA but is reasonably ancillary to the business of publishing the newspapers involved in the JOA is to be analyzed under the antitrust rule of reason, and (3) made clear that joint newspaper-related activity beyond the protection of the Act's exemption is not made unlawful by the Act itself.

SUMMARY OF THE LEGISLATION

S. 2314 would amend the definition of "newspaper publication" in the Newspaper Preservation Act[1] and would add a sentence to the Act regarding the scope of activities that may be lawfully engaged in by participants in a joint operating arrangement. The bill

[1] 15 U.S.C. §§ 1801–1804.

would have the effect of expanding the scope of exempt JOA activities to include certain so-called total market coverage ("TMC") publications and electronic publication.[2] Under the bill, the joint provision of certain TMC or electronic distribution could not be attacked as a violation of the antitrust laws, but predatory conduct by the JOA could be challenged.

S. 2314 would amend the definition of "newpaper publication" in 15 U.S.C. § 1802(4) in two ways. First, the requirement of publication on "newsprint paper" would be deleted. This would enable JOAs to utilize improved resolution paper and to engage in some types of electronic publication while staying within the Act's antitrust exemption.[3]

Second, the bill would alter the requirement in the Act that a substantial portion of the content of a "newspaper publication" be devoted to news and editorial opinion by requiring only that such publication be "delivered in whole or in part to readers and in which whole publication" a substantial portion of the content is devoted to news and editorial opinion. Under the Act as thus amended, a JOA could distribute *part* of a JOA newspaper using TMC, and the joint TMC activity would be within the Act's exemption regardless of the content (e.g., advertising) of that part.[4]

The bill also would add after the first sentence in 15 U.S.C. § 1803(c) the following: "Nor shall anything in this Act be construed to make unlawful under any antitrust law any activity undertaken by a party to a joint newspaper operating agreement in connection with a newspaper publication that could be engaged in lawfully if such person were not a party to such an agreement." This change appears intended to prevent courts from reading the Newspaper Preservation Act as making unlawful any conduct by a JOA participant that does not fit within the Act's definition of a JOA.

EFFECT ON EXISTING LAW

S. 2314 would change existing law by exempting from scrutiny under the antitrust laws certain joint conduct engaged in by participants in otherwise lawful JOAs—in particular, joint conduct involving certain TMC publishing and electronic publication.

The Newspaper Preservation Act is solely an antitrust-exemption statute. It does not itself create any legal prohibitions, but merely exempts certain conduct from scrutiny under the antitrust laws when the prior approval of the Attorney General has been obtained. *Newspaper Guild* v. *Levi*, 539 F.2d 755 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977).[5] Accordingly, joint activities by JOA

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[2] "Total market coverage" is a term used to describe distribution of material to everyone within a specific geographic area, such as a city or zip code. "Electronic publication," as used herein, would involve making available to computer terminals in homes or offices all or part of newspapers or data from newspapers.

[3] This change would also appear to bring weekly magazines within the definition of "newspaper publication," thereby enabling such magazines to qualify for the Act's antitrust exemption. We do not believe this effect to have been intended by the draftsmen.

[4] Similarly, the JOA could distribute part of a JOA newspaper electronically.

[5] A literal reading of 35 U.S.C. §1803(b) ("It shall be unlawful . . .") would make JOA conduct illegal where the JOA has neither been grandfathered under § 1803(a) nor received the Attorney General's prior approval. The D.C. Circuit in *Newspaper Guild* rejected such a literal reading of the Act as being inconsistent with congressional policy underlying the Act.

participants that do not fit within the confines of the Act's JOA exemption are neither provided an antitrust exemption by the Act nor made illegal by the Act. Thus, such joint involvement in electronic publication and TMC (where the TMC publication does not come within the Act's exemption) is neither exempt from the antitrust laws nor made illegal by the Act. Instead, such joint activities are subject to the antitrust laws.

In general, such joint activity as electronic publication and TMC would be analyzed under the antitrust laws as a joint venture. The antitrust laws recognize that some limitations on competition between members of a venture may enhance overall competition and consumer welfare by, *inter alia*, facilitating the provision of a new or different product to the public (*see Broadcast Music Inc.* v. *CBS*, 441 U.S. 1 (1979)), in competition with products produced by those outside the venture. Such analysis thus takes proper account of the presence of actual or potential competition and of any integrative efficiencies. At the same time, general joint venture analysis recognizes that, depending on the circumstances, unnecessary elimination of competition among the members of a venture can harm consumer welfare.

We are aware of one judicial decision under current law that, instead of applying this type of antitrust analysis, used an analysis that would condemn as illegal per se at least some joint publication activities by JOA participants that are not protected by the Act's exemption of their JOA. *See Wick* v. *Tucson Newspapers, Inc.*, 598 F. Supp. 1155 (D. Ariz. 1984, Supplemental Opinion 1985) (a challenge to efforts of parties to the Tucson JOA to engage in TMC through the JOA).[6] Despite *Wick*, the Department believes that under current law such joint conduct should and would be analyzed under joint venture principles.[7]

S. 2314 would thus change current law by exempting from the antitrust laws certain conduct that is presently subject to the type of antitrust analysis described above. One change, the deletion of the requirement of publication on "newsprint paper," would enable JOAs to utilize improved resolution paper and to engage in electronic publication of newspapers while clearly staying within the Act's antitrust exemption.

The bill's other change in the definition of "newspaper publication" would have the effect of bringing within the Act's exemption joint activity by JOA participants involving TMC distribution of part of a JOA newspaper regardless of the content of that part. Courts would no longer focus on whether the TMC publication standing alone constituted a "newspaper publication" as did the

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[6] The court in *Wick* apparently used this analysis because it (1) viewed joint conduct such as that at issue in Citizen Publishing v. United States, 394 U.S. 131 (1969), as being illegal per se after *Citizen Publishing*; (2) viewed the Act as exempting some such joint conduct under certain conditions; and (3) viewed all other conduct that looks like JOA conduct but has not been exempted as remaining illegal per se. *See* 598 F. Supp. at 1159. The court may also have been influenced by the fact that the Tucson JOA involved in the case was the JOA that prior to passage of the Act had been held to violate the antitrust laws by the Supreme Court in *Citizen Publishing*.

[7] The Supplemental Order in *Wick* found that the TMC publication that actually was being distributed contained substantial news and editorial opinion and thus was a "newspaper publication" within the meaning of the Act, and the preliminary injunction that had been issued against the defendants was terminated. *See* 598 F. Supp. at 1164.

court in *Wick*, but instead on whether it was part of a "newspaper publication."

It is not clear whether or how the language that the bill would add to 15 U.S.C. § 1803(c) would change existing law. While the language apparently is intended to prevent courts from reading the Act as itself making any conduct illegal, the Act already has been so constructed in *Newspaper Guild*.

DISCUSSION

The basic notion underlying the Newspaper Preservation Act is that commercial competition between two newspapers should be sacrificed when that appears to be necessary to save one of the newspapers from failing.[8] Thus, editorial competition (at least to the extent that readers continue to have available two editorial products, albeit with limited incentive for the producers of those products to compete vigorously with each other) is preserved at the expense of commercial competition. The Act assumes that substantive antitrust analysis, notwithstanding its attention to the economic condition of the parties to a JOA, might prevent this result.

Once two newspapers have merged all but their editorial operations in a JOA, questions arise as to how to treat joint activities by the JOA participants, such as certain TMC and electronic publication, that arguably do not currently fit within the Act's definition of a JOA. There are three basic ways of viewing such conduct. First, the conduct could be viewed as unlawful per se. This result could be reached either by erroneously reading the Act to make any newspaper-related joint conduct outside of the permitted JOA automatically illegal or by what we believe would be a misapplication of substantive antitrust law. Secondly, the conduct could be analyzed under the joint venture/rule of reason analysis described above. Finally, the conduct could be viewed as lawful per se. This result could be achieved by amending the Act to bring the conduct within the Act's antitrust exemption.

The Department believes generally that joint activities of JOA participants that are reasonably ancillary to their joint publication of newspapers, but that do not fit within the Act's current definition of a JOA, should be neither legal *per se* nor illegal *per se*, but should be evaluated under joint venture/rule of reason analysis.[9] We recognize, however, that Congress may, in keeping with the basic notion underlying the Act, want to fine-tune the scope of the exemption so as to bring within the exemption activities that have become part and parcel of the business of publishing a newspaper. Decisions on how to distribute all or part of newspapers—including decisions on whether and how to employ total market coverage—can be viewed as part and parcel of the business of newspaper publishing.[10] Accordingly, while the Department believes that joint ac-

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[8] *See* S. Rep. No. 535, 91st Cong., 1st Sess. 2-3 (1969).

[9] The Department does not mean to suggest that if the participants in a JOA or in any other lawful venture engage in a "naked restraint," a per se violation should not be found.

[10] TMC distribution is an established practice and is used both by newspapers and by others. According to the *1985 Editor and Publisher International Yearbook*, eleven JOAs were at that time involved in TMC programs.

tivities of JOA participants in distributing all or part of the JOA newspapers through TMC can analysis, the Department would not oppose legislation that simply and directly brings such activities within the Act's exemption and thereby treats such activities the same as other non-editorial aspects of the newspaper business.[11]

Although the Department does not oppose bringing within the Act's exemption activities that are clearly part and parcel of the business of publishing a newspaper, we do oppose bringing within the exemption other activities that, while perhaps related to the business of newspaper publishing, are not plainly part and parcel of that business. In particular, on the present record, joint efforts by JOA participants to engage in electronic publication should be evaluated under traditional joint venture/rule of reason analysis. Such analysis can take proper account of the presence of actual or potential competition and of any integrative efficiencies.

Unlike TMC, electronic publication of material currently found in newspapers has not yet moved far beyond the experimental stage. It is not possible to do much more than speculate as to the types of products and services that will be offered, and by whom. Accordingly, it is impossible to predict how closely related electronic publication will ever be to the business of publishing what we now know as newspapers. It is similarly impossible to assess at this juncture the types and magnitude of economies of scale and scope that may develop. In particular, there is no reason to assure that electronic publication will have the same types of characteristics (e.g., evening edition handicaps, economies of scale in print) that have been cited as leading to the demise of daily newspaper competition in many cities. With such limited knowledge about the economics of electronic publication, there seems to be insufficient reason to grant to JOA participants an antitrust exemption covering such activities at this time. Should the Committee believe that it is necessary to make clear that the rule of reason is the correct antitrust treatment for electronic publication or other activities closely related to the business of publishing the JOA newspapers, the Department would not oppose an appropriate clarification.[12]

Finally, with regard to making clear that the Act does not create any new legal prohibitions, the Department would not object to legislation making clear the joint newspaper-related activity beyond that protected by the Act's JOA exemption is not made unlawful by the Act itself, thus codifying the D.C. Circuit's holding in *News-*

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[11] This could be accomplished by amending the definition of "joint newspaper operating arrangement" in 15 U.S.C. 1802(2) to add immediately after the first usage of the word "distribution" the following: "of all or part of such newspaper publications". While such an amendment would bring TMC distribution of all or part of a JOA newspaper within the Act's exemption, under 15 U.S.C. § 1803(c), conduct within the Act's exemption remains subject to challenge as a predatory practice.

[12] This could be accomplished by adding a new subsection (d) following 15 U.S.C. § 1803(c) and stating: "(d) In any action under any antitrust law challenging joint conduct between the parties to a joint newspaper operating arrangement that has received the limited antitrust exemption provided by subsection (a) or (b) of this section, joint conduct between the parties that is not exempt as part of such arrangement but that is reasonably ancillary to the business of publishing the newspaper publications involved therein shall not be deemed illegal per se; such conduct shall be judged on the basis of its reasonableness, taking into account all relevant factors affecting competition in properly defined relevant markets.".

paper Guild.[13] We do not believe, however, that the language that S. 2314 would add to 15 U.S.C. § 1803(c) clarifies this point effectively. Indeed, it compounds the problem in the present wording of § 1803(b) ("It shall be unlawful . . . ") instead of directly correcting it.

We believe that S. 2314 as introduced does not sufficiently clarify the Newspaper Preservation Act and that it expands the scope of activities exempted from the antitrust laws in some ways that have not been justified on the current record. However, the Department would not oppose legislation that, in the manner suggested above, (1) fine-tunes the scope of JOA activities that are provided an antitrust exemption so as to include TMC, (2) makes clear that conduct that is not exempt as part of a JOA but is reasonably ancillary to the business of publishing the newspapers involved in the JOA is to be analyzed under the antitrust rule of reason, and (3) makes clear that joint newspaper-related activity beyond the protection of the Act's exemption is not made unlawful by the Act itself.

The Office of Management and Budget has advised that there is no objection to submission of this report from the standpoint of the Administration's program.

Sincerely,

JOHN R. BOLTON,
Assistant Attorney General.

VII. REGULATORY IMPACT STATEMENT

Pursuant to paragraph 11(b), Rule XXVI of the Standing Rules of the Senate, the Committee has concluded that the Act will have no direct regualtory impact.

VIII. COST ESTIMATE

Pursuant to paragraph 11(a) of Rule XXVI of the Standing Rules of the Senate and Section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate prepared by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 25, 1986.

Hon. STORM THURMOND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 2314, a bill to amend the Newspaper Preservation Act, as ordered reported by the Senate Committee on the Judiciary, September 19, 1986. We estimate that enactment of this bill would result in no cost to the federal government or to state of local governments.

S. 2314 would amend the Newspaper Preservation Act, which provides a limited antitrust exemption for jointly-operated newspa-

[13] This could be accomplished by amending the first sentence of 15 U.S.C. § 1803(b) to read: "It shall not be unlawful for any person to enter into, perform, or enforce a joint operation arrangement not already in effect, provided that the prior written consent of the Attorney Gereal has been obtained."

pers, to cover all parts of a newspaper. The existing act covers only publications printed on newsprint. This amendment would extend the act to publications not printed on newsprint, such as Sunday magazines printed on glossy paper. Based on information from the Department of Justice, we expect that S. 2314 would have no effect on the agency's workload or resource requirements.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

JAMES BLUM
(For Rudolph G. Penner, Director.)

IX. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of Rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 2314 as reported are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in Roman):

UNITED STATES CODE

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TITLE 15—COMMERCE AND TRADE

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NEWSPAPER PRESERVATION ACT

§ 1802. Definitions

As used in this chapter—

(1) The term "antitrust law" means the Federal Trade Commission Act and each statute defined by section 4 thereof as "Antitrust Acts" and all amendments to such Act and such statutes and any other Acts in pari materia.

(2) The term "joint newspaper operating arrangement" means any contract, agreement, joint venture (whether or not incorporated), or other arrangement entered into by two or more newspaper owners for the publication of two or more newspaper publications, pursuant to which joint or common production facilities are established or operated and joint or unified action is taken or agreed to be taken with respect to any one or more of the following: printing; time, method, and field of publication; allocation of production facilities; distribution *of all or part of such newspaper publications*; advertising solicitation; circulation solicitation; business department; establishment of advertising rates; establishment of circulation rates and revenue distribution: *Provided,* That there is no merger, combination, or amalgamation of editorial or reportorial staffs, and the editorial policies be independently determined.

(3) The term "newspaper owner" means any person who owns or controls directly, or indirectly through separate or subsidiary corporations, one or more newspaper publications.

(4) The term "newspaper publication" means a publication produced on newsprint paper which is published in one or more issues weekly (including as one publication any daily newspaper and any Sunday newspaper published by the same owner in the same city, community, or metropolitan area), and in which a substantial portion of the content is devoted to the dissemination of news and editorial opinion.

(5) The term "failing newspaper" means a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure.

(6) The term "person" means any individual, and any partnership, corporation, association, or other legal entity existing under or authorized by the law of the United States, any State or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any foreign country.

§ 1803. Antitrust exemptions

JOINT OPERATING ARRANGEMENTS ENTERED INTO PRIOR TO JULY 24, 1970

(a) It shall not be unlawful under any antitrust law for any person to perform, enforce, renew, or amend any joint newspaper operating arrangement entered into prior to July 24, 1970, if at the time at which such arrangement was first entered into, regardless of ownership or affiliations, not more than one of the newspaper publications involved in the performance of such arrangement was likely to remain or become a financially sound publication: *Provided,* That the terms of a renewal or amendment to a joint operating arrangement must be filed with the Department of Justice and that the amendment does not add a newspaper publication or newspaper publications to such arrangement.

WRITTEN CONSENT FOR FUTURE JOINT OPERATING ARRANGEMENTS

(b) [It shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States.] *It shall not be unlawful for any person to enter into, perform, or enforce a joint operating arrangement not already in effect, if the prior written consent of the Attorney General has been obtained.* Prior to granting such approval, the Attorney General shall determine that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of this chapter.

PREDATORY PRACTICES NOT EXEMPT

(c) Nothing contained in the chapter shall be construed to exempt from any antitrust law any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any

antitrust law if engaged in by a single entity. Except as provided in this chapter, no joint newspaper operating arrangement or any party thereto shall be exempt from any antitrust law.

(d) In any action under any antitrust law challenging joint conduct between the parties to a joint newspaper operating arrangement that has received the limited antitrust exemption provided by subsection (a) or (b) of this section, joint conduct between the parties that is not exempt as part of such arrangement but that is reasonably ancillary to the business of publishing the newspaper publications involved in the arrangement shall not be deemed illegal per se. Such joint conduct shall be judged on the basis of its reasonableness, taking into account all relevant factors affecting competition in properly defined relevant markets.

§ 1804. Reinstatement of joint operating arrangements previously adjudged unlawful under antitrust laws

(a) Notwithstanding any final judgment rendered in any action brought by the United States under which a joint operating arrangement has been held to be unlawful under any antitrust law, any party to such final judgment may reinstitute said joint newspaper operating arrangement to the extent permissible under section 1803(a) of this title.

(b) The provisions of section 1803 of this title shall apply to the determination of any civil of criminal action pending in any district court of the United States on July 24, 1970, in which it is alleged that any such joint operating agreement is unlawful under any antitrust law.

APPENDIX A—CITIES WITH JOA'S IN 1970

Birmingham, AL, 1950, Birmingham News Co; Birmingham Post Co.

Tucson, AZ, 1940, Citizen Publishing Co.; Arden Publishing Co.; Tucson Newspapers, Inc.

San Francisco, CA, 1964, Chronicle Pubishing Co.; Hearst Publishing Co.; San Francisco Newspaper Printing Co.

Miami, FL, 1966, Miami Daily News, Inc.; Miami Herald Publishing Co.

Honolulu, HI, 1962, Hawaii Newspaper Agency, Inc.; Honolulu Star Bulletin, Inc.; Advertiser Publishing Co., Ltd.

Evansville, IN, 1938, Evansville Courier, Inc.; Evansville Press Co.; Evansville Printing Corp.

Fort Wayne, IN, 1950, News Publishing Co.; Journal-Gazette Co.; Fort Wayne Newspapers, Inc.

Shreveport, LA, 1953, Times Publishing Co., Ltd.; Journal Publishing Co.; Newspaper Productions Co.

St. Louis, MO, 1957, Globe Democrat Publishing Co.; Pulitzer Publishing Co.

Albuquerque, NM, 1933, Journal Publishing Co.; New Mexico State Tribune; Albuquerque Publishing Co.

Lincoln, NB, 1950, Journal-Star Printing Co.; Star Publishing Co.; State Journal Co.

Columbus, OH, 1959, Dispatch Printing Co.; E.W. Scripps Co. (Columbus Citizen-Journal).

Tulsa, OK, 1941, Tulsa Tribune Co.; World Publishing Co.; Newspaper Printing Corp.

Franklin-Oil City, PA, 1956, Venango Newspapers, Inc.; News-Herald Printing Co.; Derrick Publishing Co.

Pittsburgh, PA, 1961, Pittsburgh Press Co.; Post-Gazette Publishing Co.

Knoxville, TN, Knoxville News-Sentinel Co.; Roy N. Lotspeich Publishing Co., Inc.

Nashville, TN, 1937, Nashville Banner Publishing Co.; Tennessean Newspapers, Inc.; Newspaper Printing Corp.

El Paso, TX, 1936, El Paso Times, Inc.; Herald-Post Publishing Co.; Newspaper Printing Corp.

Salt Lake City, UT, 1952, Salt Lake Tribune Publishing Co.; Desert News Publishing Co.; Newspaper Agency Corp.

Charleston, WV, 1958, Daily Gazette Co.; Charleston Mail Association; Newspaper Agency Corp.

Madison, WI, 1948, Wisconsin State Journal Co.; Madison Newspapers, Inc.; Capital Times Co.

ADDITIONAL VIEWS OF SENATOR HOWARD M. METZENBAUM

I have not objected to the committee reporting this measure. However, it should be noted that there was only limited debate on this bill when the committee considered it. Moreover, there were reservations about the need for this legislation among some Senators. As I understood the committee's action, it reported the bill without recommendation.

I agreed to the reporting of the bill as an accommodation to the sponsor of the bill with the understanding that the bill would be subject to further discussion before consideration by the full Senate. In particular, I expressed a concern that the Senate should undertake a more comprehensive review of the Newspaper Preservation Act itself before engaging in piecemeal revisions of particular provisions of the act.

In my view, the Newspaper Preservation Act may have become one of the major factors causing the steady decline of cities with two or more major newspapers. Over 20 cities in the United States now are served by a joint operating arrangement under the provisions of the act. No doubt in some cities a consolidation of competing newspapers was necessary to preserve one or both of the newspapers which combined operations. Yet in other cases, the exemption from standard antitrust principles may have resulted in a loss of competition when it could have been avoided.

I believe Congress should undertake a thorough and careful review of the Newspaper Preservation Act before adopting S. 2314 or similar minor modifications of the act. For example, it is possible that Congress should require that any party applying for a joint operating agreement should have to undertake a reasonable search for an alternative buyer—one which does not raise concerns about reducing competition—before any approval of the application could be granted. In addition, it is possible that the standard of "failing newspaper" in the act should also be re-examined to determine if any refinement is needed. S. 2314 itself addresses another area which requires study—the precise scope of the exemption and the antitrust standard which should be applied to conduct by a joint operating agreement newspaper which does not fall within the exemption.

For these reasons, I cannot support passage of S. 2314 by the Senate in its present form. While the bill does have some merit, I do not believe it would be wise for Congress to legislate in this piecemeal fashion.

In the last analysis, the question is how Congress can best promote competition among newspapers and diversity of editiorial points of view. The vitality of democracy depends on the opportunity for varied and competing opinions to be freely and effectively communicated to the public. This basic principle should be of highest concern in congressional review of the Newspaper Preservation Act.

ADDITIONAL VIEWS OF SENATOR DENNIS DECONCINI

Re: S. 2314 (Amendment to Newspaper Preservation Act)

I regret that I cannot accept many of the conclusions of the report circulated on this bill.

In 1969, a United States Supreme Court held that a system of joint operating agreements between competing newspapers was a per se violation of the antitrust laws; indeed, the Court held that this was so obvious a violation of the Sherman Act that it could be decided on summary judgment. *Citizen Publishing Company* v. *United States,* 394 U.S. 131 (1969). To take the matter at its most elementary level, a system by which two competing businesses fixed the prices of their product, to name but one of the practices, is the clearest possible violation of the statute

After that decision, the Congress was presented with proposals to modify and to authorize joint operations as an exception to the Sherman Act. The argument was advanced that, for the sake of maintaining multiple editorial voices in America, the weaker newspapers needed the sustaining strength of joint operations and, therefore, should be exempted from competition.

This argument had merit then and has merit now. The bill was strongly supported by Senator Hayden of Arizona, among others, and, although there was strenuous opposition from those who believed that no exceptions should be made to the Sherman Act, the bill did pass.

The proposal now before the Senate would permit jointly operated newspapers to deluge their own communities and all other communities which they may care to reach with the free distribution of "shoppers," bundles of preprinted advertising material which contain little or no news or editorial content. These shoppers may be included within newspapers where newspapers are sold, and to this there is no objection. However, the proposal now is that these shoppers may be taken out of the newspapers and distributed independently on a free basis; the common device is to send them to every address within a zip code area which is not already covered by true newspaper circulation.

The Newspaper Preservation Act was carefully handled and fully considered both in committee and on the floor. We are told that this device is somehow something new which was not contemplated by the Congress when it passed—and clearly did not permit as an exception to the Sherman Act—this very practice, or similar distributions of free shoppers. With all deference to the majority, this is revisionist legislative history and is simply wrong. The Senate Judiciary Committee, Sen. Rept. 91-535, Nov. 18, 1969, p. 4, on the NPA, said:

> Section 3(f): The definition of "newspaper publication" has been drawn to exclude magazines and other "slick paper" publications as well as free circulation "shopping newspapers" and advertising circulars. Unless a reasonable portion of the publication eligible for an exemption is devoted to news dissemination the intent of the bill—to give financial stability to an editorial voice—cannot be served. There can be no editorial voice without a substantial amount of editorial material.

The practice of free distribution of shoppers in this fashion was expressly found to be illegal in *Wick* v. *Tucson Newspapers, Inc.*, 598 F. Supp. 1155 (D. Ariz. 1984). The brutal realities of trade are that the suburban and small newspapers receive, in their small market areas, the same preprints and advertising materials which are included in the shoppers. Where the shoppers are made available to the entire zip code areas by the metropolitan dailies, and are distributed free, the advertiser loses all incentive to distribute the same advertising through the smaller area newspapers. The practical effect can only injure or destroy the smaller publications. For a grim illustration of precisely what can happen, see the decision in *Advantage Publications, Inc.* v. *Daily Press, Inc.*, No. 83-72-NN, (E.D. Virg. May 17, 1983), 9 Med. L. Rptr. 1761 (1983-1 Trade Cas. (CCH) P. 65,403; amended on request for clarification May 23, 1983).

The bill now before us turns the Newspaper Preservation Act on its head. The sound principle of the Newspaper Preservation Act was to permit an exemption to the Sherman Act in order to aid in the expression of a multitude of editorial voices. The amendment now offered reverses that policy by giving a ready tool for the destruction of the editorial voices of the smaller newspapers of the land. While the number of major metropolitan dailies becomes ever smaller, if we wish the expression of diverse views we have every reason to encourage the existence of the smaller newspapers; under this bill, many of them could be wiped out.

I cannot express this view better than did our late and sadly departed colleague, Senator East of North Carolina, who very shortly before his death wrote a publisher in his own state of North Carolina a letter from which I take this paragraph:

> In my opinion, it is important that a market environment is maintained whereby newspaper competition is fostered in local communities so that separate and distinct news voices and sources are available to all Americans. For this reason, the Congress should not take precipitous action which might encourage the development of news monopolies, thereby stifling competition in the marketplace of ideas and information. In the view of many independent newspapers who have written to me about this matter, the 1970 act may have actually worked to diminish rather than encourage competition, and S. 2314 would only exacerbate the situation by allowing giant newspaper organizations to take away unjustly the revenues of home-town newspapers in smaller markets.

Since its introduction, the bill has made its way down to the Department of Justice and has returned to us in much worse shape than before. In 1969 the Supreme Court in *Citizen Publishing Company* v. *United States, supra,* held, as has been noted that price fixing by newspapers was a per se violation of the Sherman Act. Under the bill as now amended at the suggestion of the Department of Justice, this, too, is overruled, and the entire act, insofar as it permits any claims whatsoever, is restricted to "rule of reason."

This is particularly unfortunate when applied, as here, to the small businessmen of the country; the small newspaper operators are commonly likely to be just that—small operators. The cost difference in prosecuting a rule of reason case as against a per se case is so overwhelming that the importation of the rule of reason test for practical purposes eliminates any function of the Sherman Act to protect such businessmen. The fact that the Supreme Court in the original case in this series was able to approve a summary judgment solution is, itself, a significant demonstration of the practical economy of the per se procedure.

While, on this record, we have some evidence that it would be increasingly profitable for some newspapers to use this free distribution of shoppers device, we have no demonstration whatsoever of the sort which was at the heart of the legislative history of the Newspaper Preservation Act. That is to say, there is not any demonstration that this further elimination of the Sherman Act is needed to save any failing newspapers; and my fear is that it will cause some failures.

The whole topic needs more mature consideration than it has had.

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